**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **MICHAEL BYNANE,** | § | |
| | § | |
| **Plaintiff,** | § | |
| | § | |
| **v.** | § | **CIVIL ACTION NO. 4:15-cv-01249** |
| | § | |
| **THE BANK OF NEW YORK MELLON, AS TRUSTEE FOR CWMBS, INC. ASSET-BACKED CERTIFICATES SERIES 2006-24; BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND DAVID GUZMAN,** | § | |
| | § | |
| **Defendants.** | § | |
| | § | |
| | § | |

**OPPOSITION BY DEFENDANTS THE BANK OF NEW YORK MELLON AS TRUSTEE FOR CWMBS, INC., BANK OF AMERICA, N.A., AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. TO PLAINTIFF'S MOTION TO RECONSIDER**

COME NOW, Defendants The Bank of New York Mellon as Trustee for CWMBS, Inc. Asset-Backed Certificates Series 2006-24 ("BONYM"), Bank of America, N.A. ("BANA"), and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively, the "Bank Defendants") and respectfully submit this memorandum of law in opposition to Plaintiff's June 19, 2015 Motion to Reconsider the Court's Denial of Plaintiff's Motion to Remand (the "Motion") (Doc. No. 18) seeking reconsideration of this Court's June 17, 2015 Order denying Plaintiff's Motion to Remand (the "Order") (Doc. No. 16). Because this Court was correct to deny Plaintiffs' Motion to Remand for all the reasons set forth in Bank Defendants' June 11, 2015 opposition to the motion to remand (the "Opposition to Remand") (Doc. No. 13), and because Plaintiff offers no viable grounds for reconsideration, the Court should deny Plaintiff's instant Motion and uphold its own prior, well-reasoned Order.

## I. INTRODUCTION

1. On April 5, 2015, Plaintiff filed his Original Petition (the "Complaint"), Case No. 2015-19401, in the 55th Judicial District Court for Harris County, Texas (the "State Court Action"). Plaintiff's Complaint relates to the property located at 2929 Buffalo Speedway, Unit 708, Houston, Texas 77098 (the "Property").

2. On May 11, 2015, Bank Defendants timely removed this matter to this Court on the basis of diversity of citizenship under 28 U.S.C. § 1332. On May 22, 2015, Plaintiff filed a Motion to Remand challenging the citizenship of Defendant David Guzman ("Guzman"), stating that "Plaintiff is informed and believes this is the location of Defendant's residence." Motion to Remand (Doc. 8) ¶ 4.

3. On June 11, 2015, Bank Defendants filed an Opposition to Plaintiff's Motion to Remand ("Opposition) (Doc No. 11).

4. On June 17, 2015, the Court issued its Order Denying Plaintiff's Motion to Remand (Doc. 16), finding Guzman was not a citizen of Texas. It is that Order which is the subject of Plaintiff's instant Motion for reconsideration.

## II. LEGAL STANDARD FOR MOTION FOR RECONSIDERATION

Rule 60(b) of the Federal Rules of Civil Procedure states: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered…

(3) fraud …, misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged…; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Because Plaintiff does not specifically allege that Sections 1-5 of Rule 60(b) apply (*see generally* Motion), Bank Defendants assume that Plaintiff intended to bring the instant Motion pursuant to Rule 60(b)(6).

The Fifth Circuit has held that "Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case." *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995). However, the Fifth Circuit has "also narrowly circumscribed its availability, holding that Rule 60(b)(6) relief will be granted only if extraordinary circumstances are present." *Id.* (internal citations omitted). "Accordingly, Rule 60(b)(6) requires a showing of 'manifest injustice' and will not be used to relieve a party from the 'free, calculated, and deliberate choices he has made.'" *Yesh Music v. Lakewood Church*, 727 F.3d 356, 363 (5th Cir. 2013) (quoting *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350 (5th Cir. 1993)).

## III. ARGUMENT

### A. The Court Properly Denied Plaintiffs' Motion to Remand.

5. The Court should deny Plaintiff's Motion to Reconsider the Order denying Plaintiff's Motion to Remand. Plaintiff's Motion is nothing more than an attempt to rehash his earlier flawed arguments regarding lack of diversity properly rejected by this Court in its Order.

6. Further, Plaintiff does not and cannot present any facts of extraordinary circumstances required to grant Rule 60(b)(6) relief. *Batts*, 66 F.3d at 747.

**B. The Order Is Based on Sound Legal Analysis, and Plaintiff's Motion to Reconsider Should Be Denied Accordingly.**

7. The Order is well-reasoned and accurately represents the controlling law. For the reasons stated below, as well as the reasons stated in the Bank Defendants' earlier Opposition to Remand (Doc. 13, dated June 11, 2015), the Court should deny Plaintiff's Motion to Reconsider.

**i. *Plaintiff's Arguments Are Untimely And Hold No Water.***

8. Plaintiff attempts great lengths to present "evidence" of Guzman's citizenship. However, the "documents" on which Plaintiff relies, *see generally* Motion at 15-52, are inadmissible because they are not properly authenticated under Rule 901 of the Federal Rules of Evidence, constitute inadmissible hearsay under Rule 801 of the Federal Rules of Evidence, and evidence nothing.

9. Plaintiff fails to provide any information regarding who created the information allegedly reported in the exhibits to his current Motion, what information was used to create the information allegedly reported therein, when the information reported therein was created, when the documents were printed, from where the documents originated (*i.e.*, the source of the printouts), how the documents were created, or why the documents were created and what purposes they serve. *See generally,* Pl.'s Motion. For these reasons, the evidence is inadmissible under the Federal Rules of Evidence.

10. Further, assuming arguendo that Plaintiff's "evidence" of Texas citizenship is accurate, Plaintiff fails to offer any compelling evidence that Guzman is servable in Texas, and has provided no explanation for why his various service attempts have all failed. *See* Pl.'s Motion at 15-52. Bank Defendants have successfully served Guzman copies of pleadings at the

***Indiana*** address in the Substitute Trustee's Deed for this Property which was provided by Guzman. *See* Bank Defs.' Opposition to Remand (Doc. 13) at ¶ 11.

**ii. *The Court Did Not Prematurely Deny the Plaintiff's Motion to Remand.***

11. Plaintiff argues erroneously that the Court's Order denying his Motion to Remand was premature. Pl.'s Motion ¶ 2. Per this Court's procedures, reply briefs are not *pro forma* and no time frame for replies is designated; thus, Plaintiff's argument regarding prematurity does not support reconsideration. The Court did not enter its Order until after the Motion to Remand was briefed by both sides. *See* Docs. 8, 11, and 16.

**iii. *The Court Properly Determined That Defendant Guzman Is a Citizen of Indiana; Thus All Parties Are Diverse.***

**12.** For the reasons stated in Bank Defendants' Opposition to Remand (Doc. 11) as well as those stated above, this Court properly retained jurisdiction over this case because there is diversity of citizenship among all parties, and the amount in controversy exceeds $75,000.00.

## IV. CONCLUSION

13. Based upon the foregoing, Plaintiff fails to meet the high standard for this Motion to Reconsider the Court's Denial of the Motion to Remand, thus the Court should deny Plaintiff's Motion and award all other and further relief the Court deems just.

DATED: July 10, 2015

Respectfully Submitted,

/s/ Kathryn B. Davis
Kathryn B. Davis
Texas Bar No. 24050364
WINSTON & STRAWN LLP
1111 Louisiana Street, 25th Floor
Houston, TX 77002
Tel. (713) 651-2600
Fax (713) 651-2700
kbdavis@winston.com

**COUNSEL FOR THE BANK OF NEW YORK MELLON, BANK OF AMERICA, N.A., AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**

## CERTIFICATE OF SERVICE

I certify that on July 10, 2015 a correct copy of the foregoing opposition brief was filed with the Court via CM/ECF and further served on counsel of record as follows:

***Via Regular Mail***
Jeffrey C. Jackson
Jackson & Elrod, LLP
2200 N. Loop West, Ste. 108
Houston, Texas 77018
***Counsel for Plaintiff***

***Via Regular Mail***
David Guzman
18597 Pribble Rd.
Lawrenceburg, IN 47025
***Co-Defendant***

/s/ Kathryn B. Davis
Kathryn B. Davis